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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/675,225	09/29/2003	Kameron W. Maxwell	MITOS.000GEN	9871
20995 7590 02/16/2007 KNOBBE MARTENS OLSON & BEAR LLP 2040 MAIN STREET FOURTEENTH FLOOR IRVINE, CA 92614			EXAMINER ROGERS, JAMES WILLIAM	
			ART UNIT 1618	PAPER NUMBER
			NOTIFICATION DATE 02/16/2007	DELIVERY MODE ELECTRONIC

Please find below and/or attached an Office communication concerning this application or proceeding.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

jcartee@kmob.com
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Advisory Action Before the Filing of an Appeal Brief	Application No. 10/675,225	Applicant(s) MAXWELL ET AL.	
	Examiner James W. Rogers, Ph.D.	Art Unit 1618	

--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

THE REPLY FILED 22 January 2007 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1. ☐ The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:

- a) ☐ The period for reply expires _____ months from the mailing date of the final rejection.
 b) ☐ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.

Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

NOTICE OF APPEAL

2. ☐ The Notice of Appeal was filed on _____. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

AMENDMENTS

3. ☐ The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because
 (a) ☒ They raise new issues that would require further consideration and/or search (see NOTE below);
 (b) ☐ They raise the issue of new matter (see NOTE below);
 (c) ☐ They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or
 (d) ☐ They present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: See Continuation Sheet. (See 37 CFR 1.116 and 41.33(a)).

4. ☐ The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).
 5. ☐ Applicant's reply has overcome the following rejection(s): _____.
 6. ☐ Newly proposed or amended claim(s) _____ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).
 7. ☐ For purposes of appeal, the proposed amendment(s): a) ☐ will not be entered, or b) ☐ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.
 The status of the claim(s) is (or will be) as follows:
 Claim(s) allowed: _____.
 Claim(s) objected to: _____.
 Claim(s) rejected: _____.
 Claim(s) withdrawn from consideration: _____.

AFFIDAVIT OR OTHER EVIDENCE

8. ☐ The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).
 9. ☐ The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing of good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).
 10. ☐ The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

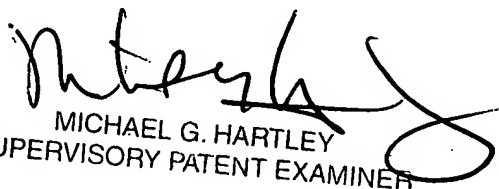
REQUEST FOR RECONSIDERATION/OTHER

11. ☒ The request for reconsideration has been considered but does NOT place the application in condition for allowance because:
See cont.
 12. ☐ Note the attached Information Disclosure Statement(s). (PTO/SB/08) Paper No(s). _____.
 13. ☐ Other: _____.

Continuation of 3. NOTE: Applicants newly amended claim includes the new limitation of "evaporating sufficient solvent to substantially reduce burning on application of radiotherapy. This new limitation was not present in the claim before and would require a new search by the examiner. Contrary to applicants assertion the examiner did not suggest amending the claim as now recited, rather the examiner only mentioned that the above limitation was not searched because applicant did not claim it, which was mentioned in applicants arguments filed 08/15/2006. The examiner already mentioned in the previous office action filed 09/15/2006 that the above limitation was not searched therefore the amendment was not entered .

Continuation of 11. NOTE: Applicant's assertion that Mitchell does not teach or suggest a thickened liquid or gel is not found persuasive. Thickened liquid or gel was interpreted in the broadest reasonable way by the examiner therefore the recitation of "thickened" is not considered to be very limiting. The examiner searched thickened liquid or gel to mean any composition that contained a solvent or a solution in which the solvent/solution was more viscous or thickened after addition of the ingredients, for example to make a cake one would use milk and flour, upon mixing milk with flour the batter is more thickened or viscous than just milk alone, the limitation was interpreted in a similar manner. Since an ointment, cream or lotion is thicker or more viscous than a solvent or solution on their own the limitation is considered met. As currently claimed there is no difference in the composition claims 1-2, 6-10,12-15 previously rejected. Claim 24 was not entered therefore the examiner will not address applicant's arguments for this claim.

Applicant further argues that Golz-Berner incorporated phospholipids into the formulation which would not readily evaporate. Applicants further argue that the exemplary creams contain both the phospholipids and glycerine, both of which have a slow evaporation rate. This argument is not found persuasive because Golz-Berner was used in a 103(a) rejection as a secondary reference primarily for it's disclosure of the use of solvents, carriers and hydrogels which are the same as the applicants claimed ingredients (ethanol, propylene glycol, water and natural polymers), in combination with Mitchell, who does not disclose the mandatory use of phospholipids in the nitroxide protectant composition. The rejection was based on that it would have been obvious to one skilled in the art to include and/or modify the solvents and carriers of Golz-Berner with the composition of Mitchell, especially since they are related to the same field of endeavor. The examples within Golz-berner were given solely for the purpose of illustration and were not to be construed as being limiting to their invention since many variations are possible without departing from the spirit and scope of the invention. Clearly there are other carriers that could be employed as disclosed in the specification such as ethanol and water.


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SUPERVISORY PATENT EXAMINER